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IN THE

Supreme Court of the United States

CLAUDE M. BALLARD and MARY B. BALLARD,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF JOSHUA S. KANTER, AS EXECUTOR OF THE ESTATE OF BURTON W. KANTER, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The petition for certiorari arises out of a single Tax Court trial over five weeks involving three taxpayers, including Burton W. Kanter.[1] Kanter, the main witness at trial, was one of the leading tax and estate lawyers in the country and taught for nearly 15 years as an adjunct at the University of Chicago Law School. Because the three taxpayers resided in different circuits, their appeals were taken to different Courts of Appeals. In Kanter's case, the Seventh Circuit sharply divided, 2-1, over whether the Tax Court's trial processes violated due process and other federal law. *Estate of Burton W. Kanter v. Commissioner*, 337 F.3d 833 (7th Cir. 2003). Kanter has sought *en banc* review, and the Seventh Circuit has required the government to answer Kanter's *en banc* petition. The Seventh Circuit's rules suggest a final determination on whether to grant the *en banc* petition no later than November 3, 2003.

Kanter, Claude Ballard, and Robert Lisle were found in the Tax Court to have engaged in concerted action to commit tax fraud. With respect to Lisle, the Fifth Circuit, per Judge Higginbotham, overturned the fraud judgment for lack of sufficient evidence. *Estate of Robert W. Lisle v. Commissioner*, 341 F.3d 364 (5th Cir. 2003). With respect to Ballard, the Eleventh Circuit panel upheld the fraud judgment and rejected Ballard's constitutional challenges. With respect to Kanter, the Seventh Circuit panel divided 2-1 on precisely the same constitutional issues presented in

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no person other than *amicus* and its counsel have made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

Ballard.

Kanter has a direct and obvious interest in this Court's determination whether to grant certiorari in *Ballard*. Resolution of these issues in *Ballard* could materially affect subsequent judicial treatment of those issues in *Kanter*. Kanter has a significant interest, in the alternative, in this Court holding the petition in *Ballard* for a short time pending the Seventh Circuit's decision on whether to grant *en banc* review. Holding *Ballard* for this period will afford this Court a complete record and final judgment in all Courts of Appeals on the substantial constitutional issue that has divided lower court judges.

STATEMENT

1. The fundamental issue in this case is whether the trial structure of the Tax Court violates due process or other federal law. *Amicus curiae* seeks to highlight one critical fact about the proceedings below. The Tax Court employs trial judges but keeps secret their legally binding and "presumptively correct" findings of fact. Tax Court decisions are legally required to rely upon these findings, but these findings are not, at any time, made part of the public record of the case. Neither the taxpayer, the government, nor the reviewing Court of Appeals is given access to the trial judge's "presumptively correct" findings of fact and credibility judgments. Yet these findings form the basis, in part, of the Tax Court's decisions.

The Courts of Appeals are legally obligated to ensure that Tax Court findings of fact are supported by the evidence and not clearly erroneous. But the appellate courts cannot adequately perform this function because they do not have access to the findings

of the judge who presided at trial. This non-transparent process of decisionmaking is challenged in the *Ballard* and *Kanter* cases as violating the due process rights of taxpayers and the statutory obligations of the Tax Court. Those statutory obligations include that "all reports of the Tax Court . . . shall be public records." 26 U.S.C. § 7461(a).

In *Kanter*, the Seventh Circuit panel divided 2-1 on both the constitutional and statutory issues. In an extensive, 28-page dissent, Judge Cudahy concluded that the Tax Court's decision-making structure is indeed unconstitutional. The Seventh Circuit opinions focus considerably greater attention on these issues than does the Eleventh Circuit in *Ballard*.

2. Tax Court Special Trial Judges (STJs) preside over many complex and financially significant cases, including those involving allegations of fraud. The Tax Court consists of up to 19 regular Tax Court judges presidentially appointed for 15-year terms and removable only for cause. 26 U.S.C. § 7443. The Tax Court also includes 10 STJs. An STJ is appointed at the discretion of the Chief Judge; has no statutorily mandated term of office; and serves at the pleasure of the Tax Court. 26 U.S.C. § 7443A. The Chief Judge can assign any case, "regardless of complexity or amount," to an STJ for trial and initial findings of fact, credibility judgments, and proposed decision. *Freytag v. Commissioner*, 501 U.S. 868, 877-80 (1991); 26 U.S.C. § 7443A(b)(5). An STJ exercises "significant governmental authority" and hence is an inferior officer of the United States who can be appointed (unlike a law clerk, a mere employee) only in accord with Article II of the Constitution. *Freytag*, 501 U.S. at 880-82. This

case addresses the implications of *Freytag*. Now that STJs preside over numerous cases of great complexity and large amount, the Tax Court's treatment of the trial judge's findings and credibility judgments has become all the more important.

3. The constitutional issues presented in this case arise from a complex civil tax fraud case, which was tried for nearly five weeks in the Tax Court before an STJ. Credibility judgments were critical. Sixty witnesses testified; the STJ asked questions of 40 of those witnesses. In such a case, as Judge Cudahy observed, "[t]he detailed interconnection of the credibility of different witnesses on different factual issues makes the accumulated impressions of the presiding officer irreplaceable." *Kanter*, 337 F.3d at 886. After working more than four years post-trial to prepare a report, the STJ filed his report, including his findings of fact and proposed opinion.

This Rule 183 report must be prepared by the STJ and filed with the Chief Judge under the Tax Court's own rules. T.C. Rule 183(b). The Chief Judge then assigns the case to a reviewing Tax Court judge. The Rule 183 report has direct, operative legal effect.

Rule 183 requires that: "Due regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct." T.C. Rule 183(c). The United States Court of Appeals for the District of Columbia Circuit, in an opinion by Judge Williams, has construed "due regard" to permit the Tax Court to overturn a trial judge's findings only if those findings can be shown to be "clearly erroneous." *Stone*

v. Commissioner, 865 F.2d 342 (D.C. Cir. 1989). The Courts of Appeals must ensure that Tax Court reviewing judges adhere to the limits on their review power. 26 U.S.C. § 7482. Subject to the "presumptively correct" and "due regard" constraints, the reviewing judge can adopt, modify, or reject, in whole or in part, the trial judge's report. T.C. Rule 183(c). The reviewing judge has no first-hand knowledge of the trial or the testimony. The reviewing judge also need not (and in this case, did not) hear argument or receive additional briefs. *Id.* There is no dispute that the "due regard" standard binds the reviewing judge and imposes a legal constraint on the reviewing judge's authority to overturn the trial judge's findings.

Before 1983, Tax Court rules *required* the routine disclosure of the STJ's report. *See* T.C. Rule 182(b), 60 T.C. 1149 (1973). But without any explanation, the Tax Court then amended the rule to eliminate disclosure of the trial judge's legally required report. 81 T.C. 1070 (1983) (renumbering as Rule 183). Thus, the Tax Court now adopts the position that, as a per se matter, it will refuse to make the trial judge's report part of the record. As far as *amicus* is aware, the Tax Court is, as Judge Cuhady observed, "unique among all the institutions in the law" in claiming the power to refuse to disclose the "presumptively correct" findings of fact of a trial judge or hearing officer. *Kanter*, 337 F.3d at 874. The Tax Court prohibits the trial judge's report from being made available in any litigation context, at any stage of the proceedings, to any actor outside the Tax Court. Even in a civil tax fraud case where credibility findings are critical, it is impossible for the

Courts of Appeals upon review to take the trial judge's "presumptively correct" findings in the Rule 183 report into account in any way.

4. The government, on behalf of the Tax Court, defends the following process: after the trial judge files the legally operative Rule 183 report, the reviewing judge and the trial judge may discuss the findings of fact and credibility judgments. If the reviewing judge disagrees with the trial judge's initial findings, the reviewing judge can privately "persuade" the trial judge (employed at the pleasure of the Tax Court) to jointly sign a new opinion with modified or alternative findings. This reversal of the "presumptively correct" findings filed in the Rule 183 report is never reflected in the record. The trial judge's findings and Rule 183 report remain secret, even from the reviewing court. Instead, the Tax Court issues a final decision that always (as in this case) starts with the following boilerplate: the Tax Court judge "agrees with and adopts the opinion of the special trial judge." Like Judge Cudahy in the Seventh Circuit, *amicus* has been unable to find a single case without exactly this formulaic language in the nearly 900 Tax Court decisions decided pursuant to 26 U.S.C. § 7443A(b)(5) or its predecessor since 1983. *Kanter*, 337 F.3d at 876. This unbroken pattern explains why the government acknowledges that reviewing judges do regularly modify or reject findings of fact, but behind the scenes in a way that leaves no trace in the public record.

The government concedes that this boilerplate language does *not* mean that the reviewing Tax Court judge has accepted the original STJ's findings of fact and credibility judgments in the Rule 183 report.

Instead, the reviewing judge "adopts the opinion" (not the "report," the legally specified term of art under Rule 183) of the trial judge *after* the findings of fact have potentially been modified or even overturned. There is no way for the reviewing Court of Appeals, the taxpayer, or the government to know whether, in fact, any such modifications have taken place in any specific case. As Judge Cudahy concluded in the Seventh Circuit, "I do not believe that the concealment of the Tax Court's revision process behind that [boilerplate] verbal formula allows this court to conduct meaningful appellate review." *Kanter*, 337 F.3d at 888.

5. In this case, the trial judge's Rule 183 report was before the reviewing Tax Court judge for 15 months. According to uncontradicted, sworn testimony, both the Chief Special Trial Judge and a Tax Court judge, perhaps outraged by the secret reversal of the trial judge's credibility findings, came forward to assert that the trial judge's Rule 183 report findings had been reversed outside the record.[2] Indeed, "those sections containing findings related to the credibility of witnesses and findings related to fraud were wholly contrary to the findings made by [the trial judge] in his report."[3]

6. The government's position is that as long as the trial and reviewing judges purportedly "agreed" at the

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[2] Tax Court counsel filed an uncontradicted affidavit testifying to these statements. *Declaration of Randall G. Dick*, App. at 1a. Counsel did not raise these statements in his first two motions seeking disclosure; only after these two motions were denied did counsel believe his legal obligations to his client required testifying to these statements.

[3] *Id.* ¶ 5.

end of the day to a second document – the final opinion of the Tax Court – then the first document – the Rule 183 report – need not and cannot be disclosed. The government asserts that Tax Court trial judges are the equivalent of law clerks and the Rule 183 reports tantamount to bench memos. This despite the fact that the Rule 183 reports have legally operative effect and include "presumptively correct" findings of fact and critical credibility judgments.

Prior to this case, the Tax Court bar and the Courts of Appeals had no way of knowing that the Tax Court operated in the way that this litigation has revealed. That revelation has produced considerable furor in the Tax Court bar. Many commentators argue that the Tax Court process violates due process.[4] In *Kanter*, Judge Cudahy dissented at length to agree with that conclusion. The Seventh Circuit is currently considering whether to review that issue *en banc*.

REASONS FOR GRANTING OR HOLDING THE PETITION

The constitutional question of whether STJ reports must be disclosed is of exceptional practical and national importance. Since this Court's decision in *Freytag*, STJs have come to be used more frequently in some of the financially largest and most complex cases before the Tax Court. In *Freytag* itself, the amount at stake was $1.5 billion. 501 U.S. at 871 n.1. This case involves one of the most complex cases before the Tax

[4] *See* Gerald A. Kafka & Jonathan Z. Ackerman, *Fact-Finding in the Tax Court: Access to Special Trial Judge Reports*, 91 Tax Notes 639, 642 (Apr. 23, 2001); Cornish F. Hitchcock, *Public Access to Special Trial Judge Reports*, 2001 Tax Notes Today 199-41 (Oct. 15, 2001).

Court. The trial took five weeks, the amount currently at issue is at least $45 million, and witness credibility was critical on the dispositive, complex issues of intent and fraud. Since 1983, around 900 cases have been tried to STJs employing the procedures used here.

Secret trial judge reports violate this Court's precedents on the constitutional role of factfinding, credibility judgments, and appellate review in judicial and administrative processes. In addition, Tax Court secrecy of this sort violates the federal statutes governing Tax Court proceedings and appellate review. Only this Court's review can bring uniformity and transparency to a process of adjudication in the Tax Court that offends core due process principles, involves enormous financial and personal stakes, and affects cases in every Court of Appeals. Resolution of the issues presented here also has direct implications for the role of hearing officers, administrative law judges, and other finders of fact in administrative proceedings and Article I courts. As Judge Cudahy recognized in the Seventh Circuit, the constitutional issue raised here affects "the whole administrative array of the federal government;" if the decision below is not reversed, it will lead agencies throughout the government to conclude that they may "deny transparency when engaging in like decisional processes" to those the Tax Court uses here. *Kanter*, 337 F.3d at 875.

As an alternative to granting the *Ballard* petition at this stage, the Court should hold *Ballard* until the Seventh Circuit acts upon the *en banc* petition in *Kanter*. The due process issue is the focus of the 2-1 division within the Seventh Circuit panel. Given the length and forcefulness of Judge Cudahy's dissent,

there is obviously strong disagreement in the Seventh Circuit on the fundamental constitutional issue raised here.

A brief hold in *Ballard* will afford this Court the benefit of full lower-court analysis of a substantial constitutional issue that already is dividing lower-court judges.[5]

I. THE TAX COURT'S DECISIONMAKING PROCESS VIOLATES ELEMENTAL PRINCIPLES OF DUE PROCESS

The final decision of the Tax Court *depends*, in part, on an undisclosed trial judge's report that has legally operative effect under the "due regard" standard of Rule 183. That report is part of the "private record" of the case, but not the public record. This practice – inconsistent with every federal agency or court of which *amicus* is aware – surely violates due process, particularly in a tax fraud trial where credibility is critical.

This process violates a taxpayer's due process rights to a fair initial trial and adequate appellate review. Because constitutionally protected property and liberty interests are at stake in a tax fraud trial, the three-part test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) and *United States v. Raddatz*, 447 U.S. 667, 677 (1980) must be applied for determining the process required. That familiar test requires an assessment of (1) the private interests at stake; (2) the extent to which decisionmaking accuracy will be enhanced by

[5] The government acknowledged the importance of co-ordinating judicial treatment of *Ballard* and *Kanter* in its motion for an extension of time to file its *en banc* answer in *Kanter*. *See* App. at 4a.

providing the procedure at issue; and (3) the public interests implicated by the procedure at issue. In this context, the second part of this standard is critical: whether disclosure of the trial judge's report will significantly enhance the accuracy of the overall decisional process. This Court has long recognized the common-sense principle that accuracy is substantially enhanced by including the trier of facts' findings and credibility judgments in the public record. Analysis of the due process issue must be informed by this Court's decisions on the legal role of factfinding and credibility judgments in judicial and administrative decisionmaking.

Disclosure of the findings of a trial judge, hearing officer, or analogous initial factfinder is such a fundamental premise of fair and proper judicial and administrative process that *amicus* has been unable to find *any* area in modern law, outside the Tax Court, where such disclosure is not routine. "As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis" of due process issues. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) (citations omitted). Transparency of agency and judicial decisionmaking has long been a fundamental premise of American practice. Even the Administrative Procedure Act (APA) -- which applies to the less formal processes of agencies, not to courts such as the Tax Court which are presumably held to even higher standards -- requires that the record on review must include any preliminary findings from a hearing officer or administrative law judge, regardless of whether the agency has *de novo* power over facts. 5 U.S.C. §§ 557(b), 706. The

framers of the APA considered this a critical requirement, particularly "on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide. . . ."[6] As Judge Cudahy noted in *Kanter*, "[w]hen a reviewing court reviews agency findings on credibility for substantial evidence, it is strongly influenced by the preliminary findings of the ALJ who actually heard the witnesses – influence that becomes even more significant when an agency has reversed those preliminary credibility findings." *Kanter*, 337 F.3d at 885.

Congress has also required that the report of a magistrate judge (who, unlike the STJ here, may be employed only with the consent of the parties) be served on the parties and be part of the record. That is so even though the District Court has greater legal authority in reviewing a magistrate's actions than the Tax Court does in reviewing the "presumptively correct" findings of its trial judges. Unlike the Tax Court, which is legally bound to treat its trial judge's findings as presumptively correct, a District Court can make *de novo* factual findings on certain matters a magistrate addresses. *See* 28 U.S.C. § 636(b)(1). Similarly, a bankruptcy judge's initial findings of fact are part of the record and cannot be set aside upon review in the District Court unless clearly erroneous; the District Court must also specifically give "due regard . . . to the opportunity of the bankruptcy court to judge the credibility of the witnesses." Fed. R. Bankr. P. 8013. The reports of Special Masters, including findings of fact where required, must be filed with the

[6] Final Report of Attorney General's Committee on Administrative Procedure 51 (1941).

clerk of the court; the parties must be notified of this filing. Fed. R. Civ. P. 53(e)(1). *See also* Fed. R. Civ. P. 52(a).

This Court, Congress, and the lower federal courts have thus consistently concluded that the accuracy, accountability, and integrity of administrative and judicial proceedings require including in the record the initial findings of any preliminary factfinder. That is so even for routine matters in which constitutionally-protected liberty and property interests are not at stake. That must be all the more so in a tax fraud trial, in which constitutionally-protected property and liberty interests are implicated. Decisionmaking accuracy, within the meaning of *Mathews*, demands disclosure of the Rule 183 report. That would be so even if the Tax Court were not required to treat the findings in that report as "presumptively correct." Given that these findings *do* legally constrain the reviewing Tax Court judge, it is clear that accurate decisionmaking and review is not only enhanced but only made possible by disclosing a report that forms the basis for the Tax Court's decision. Because the added public cost of disclosure is de minimis — if transparency is a cost at all, as opposed to a benefit — *Mathews* requires disclosure.

Due process protections for factfinding are even more enhanced when, as here, credibility is at issue. *Raddatz* makes clear the constitutional dimensions surrounding the overturning of a trier of fact's credibility judgments. *Raddatz* involved the relationship between the District Courts and magistrates in suppression-hearing contexts when the magistrate has conducted a hearing and made credibility

judgments. In that context, this Court suggested, and the lower courts have consistently concluded, that due process is violated if a District Court overturns a magistrate's findings on credibility without hearing the witnesses. 447 U.S. at 681 n.7; *see, e.g., Cullen v. United States*, 194 F.3d 401, 406 (2d Cir. 1999) (Newman, J.) (due process violated when District Court without hearing witnesses rejects Magistrate's credibility findings regarding plea bargain); *Hill v. Beyer*, 62 F.3d 474, 482 (3d Cir. 1995); *In re Hipp, Inc.*, 895 F.2d 1503, 1519-21 (5th Cir. 1990). If the District Judge cannot constitutionally reverse credibility judgments without hearing the witnesses, it goes without saying that the magistrate's report must also be part of the record. The decision below conflicts with *Raddatz* and these decisions of the Courts of Appeals and for that reason alone requires this Court's review.

To protect the STJ's factfinding role on credibility and other matters, the trial judge's report must similarly be part of the record. This Court's substantive emphasis on the role of credibility findings in proper adjudicative processes surely requires the procedural measure of including in the record the findings and credibility judgments of the STJ who presided over the trial. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985) ("When findings are based on determinations regarding the credibility of witnesses, [the clearly erroneous standard] demands even greater deference to the trial court's findings . . . ."); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) ("[E]vidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case

has drawn conclusions different from the Board's than when he has reached the same conclusion . . . . The significance of [the presiding judge's or examiner's] report, of course, depends largely on the importance of credibility in the particular case.") (Frankfurter, J.).

This case highlights how essential the trial judge's findings are to preserve due process and the right to adequate appellate review. Intent and credibility are critical elements in this tax fraud case. To establish fraud, the government must prove by clear and convincing evidence that underpayment occurred with the intent to evade taxes that the taxpayer knew or believed to be owed. This case involves three taxpayers who the government claims were involved in a conspiracy to commit tax fraud. But the Court of Appeals for the Fifth Circuit, in an opinion by Judge Higginbotham, has already held clearly erroneous the Tax Court's fraud judgment in this very case with respect to one of the purported "co-conspirators." *Estate of Lisle v. Commissioner*, 341 F.3d 364 (5th Cir. 2003). In addition, in upholding the Tax Court's findings against Kanter, the Seventh Circuit at least eight times gave central importance to the Tax Court's purported judgments regarding Kanter's credibility or his "intent." Indeed, the divided panel held that "the lack of credibility of Kanter's testimony," which the Tax Court purportedly found, was a central justification for upholding the judgment of fraud. *Kanter*, 337 F.3d at 846. Yet undisputed record evidence shows that the actual trial judge found that Kanter and Ballard were in fact credible and had no intent to defraud. Those original findings and the reasons the reviewing judge gave for overturning them are, at the least, *relevant* –

indeed, they would likely be critical – to federal appellate review of Tax Court decisions.

Before this case, the Tax Court's procedure was itself shrouded in secrecy. Neither the Tax Court rules nor any other document of the Tax Court of which *amicus* is aware publicly described this policy. The government's briefs remained enigmatic. The Eleventh Circuit mistakenly thought petitioners' arguments were moot because the trial judge ultimately signed the second document, the final Tax Court opinion.

But the view that the due process issue is moot misunderstands the essential constitutional challenge here. That challenge does not depend on whether the Tax Court reviewing judge and the special trial judge (who is employed at will by the Tax Court) can appropriately be characterized as "agreeing" at the end of the day — even assuming there were any way of knowing or determining this fact. The Rule 183 report, legally required, is itself a legally operative document whose "presumptively correct" findings of fact must be given "due regard." There is a world of difference between a factfinder committing findings to the record, with those findings then reviewed under the appropriate standard, and a factfinder negotiating and modifying those findings in secret with a reviewing judge under an unknowable standard of review not capable of being judicially enforced. The integrity of the legal process — and hence due process itself — depends on a differentiation between the roles and functions of different legal actors, such as factfinders and reviewing judges.

The Tax Court must comply with its own rules, and the federal courts must ensure that the Tax Court

has done so. *See, e.g., Service v. Dulles*, 354 U.S. 363, 388 (1957). It is not a lawful process for the trial and reviewing judges to negotiate their own private understanding of what "due regard" means, and whether it has been given, and then make these determinations unreviewable. No court can just announce that it "has complied with all legal requirements" and, by that bare proclamation, insulate its decision from all appellate review.

Moreover, as Judge Cudahy's dissent in the Seventh Circuit analyzed in detail, the structural imbalance of power between an at-will trial judge and the Tax Court makes any purported final "agreement" between trial and reviewing judge too shaky a foundation on which to rest the due process rights of taxpayers. In nearly 900 cases since 1983, not a single disagreement between an STJ and reviewing judge has ever emerged on the record. Whether this unbroken pattern reflects genuine agreement or the fact that STJs serve at the pleasure of the Tax Court is not a question on which this Court need speculate. Either way, the Rule 183 report must still be made part of the record.

II. FEDERAL STATUTES REQUIRE DISCLOSURE OF THE TRIAL JUDGE'S FINDINGS

The Tax Court practice also violates the federal statutes that govern the Tax Court. See 26 U.S.C. §§ 7459, 7461, and 7462. Section 7461(a) requires that "all reports of the Tax Court . . . shall be public records." The STJ's Rule 183 report is such a report, as the plain language of Rule 183 itself recognizes. *See* T.C. Rule 183(b) (requiring preparation and filing of the "Special Trial Judge's Report"). The statutory text

does not exempt the STJ's Rule 183 report from the statute's disclosure requirements. The plain language of Section 7461(a) therefore requires that this report be a public record. Similarly, Section 7459(b) requires that "[t]he Tax Court shall report in writing *all* its findings of fact, opinions, and memorandum opinions" (emphasis added). The Rule 183 report includes findings of fact and opinions of the Tax Court. In addition to the plain language of the statutes, the general purposes of these statutes reflect a not surprising congressional policy commitment to transparency in Tax Court adjudications. The Tax Court's refusal to disclose the findings of its trial judges is flatly inconsistent with the text and purposes of these statutes. In light of the constitutional problems otherwise presented, these statutes should be construed, as Judge Cudahy in the Seventh Circuit also concluded, to require disclosure of the Rule 183 trial judge's report. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

In addition, Congress has assigned the Courts of Appeals the duty to review decisions of the Tax Court. *See* 26 U.S.C. § 7482. That appellate obligation must include the ability to review the legally relevant record as a whole. Findings of fact that are legally binding on the Tax Court, that form part of the basis for decision, but that are secret and not part of the record on review preclude the Courts of Appeals from performing their statutorily-assigned role. In light of the serious constitutional questions at stake, the appellate review statute should also be construed to require disclosure of the Rule 183 report.

III. THE PETITION FOR WRIT OF CERTIORARI SHOULD, IN THE ALTERNATIVE, BE HELD

This case and *Kanter* arise from the same underlying Tax Court decision and raise the same legal issues. The Seventh Circuit is scheduled to issue a determination whether to grant the pending petition for rehearing in *Kanter* no later than November 3, 2003. Seventh Circuit Operating Procedure No. 5. This Court should hold *Ballard* until the Seventh Circuit acts on the pending *en banc* petition. In essence, the appellate court proceedings reviewing the Tax Court action are not yet concluded; this Court should await a "final order" of the Seventh Circuit before acting on the *Ballard* petition. Counsel for Ballard have filed a letter with the clerk of this Court making a similar request.[9]

A short hold of this petition until the Seventh Circuit rules on rehearing would give this Court the benefit of full lower-court analysis and consideration of the constitutional questions raised here. The petition for certiorari should therefore be held pending the Seventh Circuit's ruling on the *Kanter* rehearing petition. If the Seventh Circuit denies the *Kanter* rehearing petition, Kanter intends to file a petition for writ of certiorari expeditiously.

CONCLUSION

The petition for writ of certiorari in *Ballard* should be granted. Alternatively, the Court should hold that

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[9] The fraud judgment in *Lisle* was held clearly erroneous in the Fifth Circuit, resulting in a reversal of most of the deficiency and penalties assessed against the *Lisle* estates by the Tax Court. The time in which a petition for certiorari can be filed in *Lisle* will expire on October 28, 2003.

petition until the Seventh Circuit acts on the pending *en banc* petition in *Kanter*. The Court should then consider the *Ballard* petition and any petition in *Kanter* together.

Respectfully submitted,

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October 6, 2003

APPENDIX

APPENDIX A — DECLARATION OF RANDALL G. DICK DATED AUGUST 21, 2000

UNITED STATES TAX COURT

Docket Nos. 43966-85, 712-86, 45273-86, 1350-87, 31301-87, 33557-87, 3456-88, 30830-88, 32103-88, 27444-89, 16421-90, 25875-90, 26251-90, 20211-91, 20219-91, 21555-91, 21616-91, 23178-91, 24002-91, 1984-92, 16164-92, 19314-92, 23743-92, 26918-92, 7557-93, 22884-93, 25976-93 and 25981-93

INVESTMENT RESEARCH ASSOCIATES, LTD., AND SUBSIDIARIES, et al.,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECLARATION OF RANDALL G. DICK

Randall G. Dick, for his Declaration under penalty of perjury, pursuant to 28 U.S.C. § 1746, states as follows:

1. I am of full age, and if called to testify, would be competent to give the testimony as to the following matters.

Appendix A

2. I am counsel for Investment Research Associates, Ltd. and Subsidiaries and for Burton and Naomi Kanter.

3. In its Opinion in this matter filed on December 15, 1999 (T.C. Memo 1999-407) the U.S. Tax Court concluded, with respect to Issue 1, that payments made by Hyatt, Frey, Schaffel, Schnitzer and Eulich (the "Five") were taxable to the individual Petitioners and the individual Petitioners were liable for the fraud additions to tax and penalty with respect to such income. (Opinion, 226-319).

4. Subsequent to the issuance of the Tax Court's Opinion, Declarant was informed by two judges of the Tax Court, that in his original report submitted to the Chief Judge pursuant to Rule 183(b), Special Trial Judge D. Irwin Couvillion concluded that payments made by the Five were not taxable to the individual Petitioners and that the fraud penalty was not applicable.

5. In my conversations with the judges of the Tax Court, I was told the following: That substantial sections of the opinion were not written by Judge Couvillion, and that those sections containing findings related to the credibility of witnesses and findings related to fraud were wholly contrary to the findings made by Judge Couvillion in his report. The changes to Judge Couvillion's findings relating to credibility and fraud were made by Judge Dawson.

Appendix A

6. Judge Dawson's revisions resulted in a finding that over nine million dollars is taxable to the individual Petitioners. This finding, based upon credibility of witnesses, results in liability of the individual Petitioners for tax, penalties and interest in an amount in excess of $30,000,000.

7. I confirmed the information in paragraphs 4 and 5 above with another judge of this Court, who informed me that, in fact, the Opinion was changed, and that to his knowledge, it was the first time the Tax Court had made an outright rejection of credibility findings made by a Special Trial Judge.

8. I was also told by a judge of the Tax Court that the changed sections of the report were written in such a way so that wherever there was the "slightest issue of doubt, it went against" the Petitioners.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration is executed in San Francisco, California on August 21, 2000.

s/ Randall G. Dick
RANDALL G. DICK

APPENDIX B — MOTION FOR EXTENSION OF TIME IN WHICH TO FILE ANSWER TO PETITION FOR REHEARING AND PETITION FOR REHEARING IN BANC DATED SEPTEMBER 12, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 01-4316, 01-4317, 01-4318, 01-4319, 01-4320, 01-4321, 01-4322, 02-1220

ESTATE OF BURTON W. KANTER, DECEASED, and NAOMI R. KANTER,

Petitioners-Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

MOTION FOR EXTENSION OF TIME
IN WHICH TO FILE ANSWER
TO PETITION FOR REHEARING
AND PETITION FOR REHEARING IN BANC

Comes now the Commissioner of Internal Revenue, by and through his counsel, and respectfully moves for an extension of time in which to file his answer to the petition for rehearing and petition for rehearing en banc in the above-entitled consolidated cases for a period of 21 days, from September 23, 2003, to and including October 14, 2003. In support of this motion, counsel states as follows:

Appendix B

1. The Commissioner's answer to the petition for rehearing and petition for rehearing en banc in the above-entitled case is currently due to be filed and served on or before September 23, 2003, and no request for an extension of time with respect to the answer has previously been sought.

2. The above-entitled cases are among a group of three cases that arose out of the same proceedings before the Tax Court, and which involve challenges to the procedures employed by the Tax Court in its use of special trial judges. The other two cases are *Ballard v. Commissioner* (S.Ct. No. 03-283), and *Lisle v. Commissioner* (5th Cir. No. 01-60639 through 01-60642). The Government's response to the petition for a writ certiorari filed in *Ballard* is due to be filed in the Supreme Court on October 6, 2003.

3. As a result of the filing of the petition for a writ of certiorari in *Ballard*, the Office of the Solicitor General now has responsibility over that case. Because the issue in *Ballard* and the above-entitled case are essentially identical, it will be necessary to coordinate with the Office of the Solicitor General in preparing the response to the petition for rehearing and rehearing en banc filed in the above-entitled cases. In order to allow for this coordination, an extension of time until a short period after the due date for filing of the response to the petition for a writ of certiorari in *Ballard* is needed for the Commissioner to file the answer to the petition for rehearing and rehearing en banc filed in the above-entitled cases.

4. In addition, I could not turn to preparation of a draft answer to the petition for rehearing and rehearing en banc immediately in any event due to the press of previously assigned work, including preparation of the brief for the United States in *Crigler v. Commissioner* (4th Cir. No. 03-1861), due on extension on September 18, 2003, and preparation of the draft brief in opposition to a petition for a writ of certiorari in *Shell Petroleum, Inc. v. United States* (S.Ct. No. 03-283), currently due to the Supreme Court on September 22, 2003, and for which we anticipate that an extension of time to October 22, 2003 will be sought.

5. We have today provided a copy of the foregoing motion, by facsimile (in addition to service thereof), to Richard H. Pildes, counsel for the appellants.

WHEREFOR, for the reasons stated, the Commissioner respectfully moves that the time for filing and serving his answer to the petition for rehearing and petition for rehearing en banc be extended from September 23, 2003, to and including October 14, 2003.

s/ Steven W. Parks
STEVEN W. PARKS
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Tax Division
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Counsel for the Commissioner

Dated: This 12th day of September, 2003.